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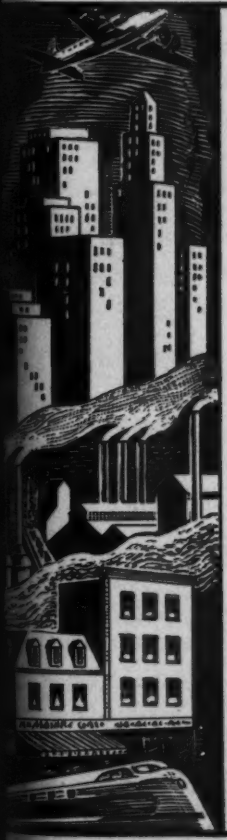

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OCTOBER—NOVEMBER 1953

Contents

Recent Decisions

Information about the various states' special requirements affecting foreign contracting corporations is always up-to-the-minute, always available to counsel at any C T office.

- **States which require the foreign corporation to be qualified when applying for a contractors license.**
- **States which require the foreign corporation to obtain a contractors license before submitting a bid.**
- **States in which boards issuing contractors licenses meet only at stated times.**

Play it safe. When one of your clients bids on an out-of-state construction contract check with the nearest C T office to see if it is subject to any special state licensing requirements.

what constitutes doing business

Loaning Money on Real Estate Mortgages

DURING THE PAST FEW YEARS, a number of states have enacted legislation designed to indicate that foreign corporations may loan money on mortgage on local real estate without the necessity of qualifying to do business as foreign corporations. Included in this group are:

Alabama (Act 527, Laws of 1953).

Illinois (Sec. 212, Ch. 32, Rev. Stats., 1941, as amended by H. B. 410, Laws of 1953);

Michigan (Sec. 450.97, C. S. 1948, as amended by P. A. 180, Public Acts of 1953—limited to FHA and VA insured mortgages);

Missouri (H. B. 296, Laws of 1953. The application of the law, however, is limited to foreign banking corporations and foreign savings and loan associations, including, but not by way of limitation, trust companies, mutual savings banks and national banking associations).

New Mexico (Sec. 54-804(b), C. S. 1941, as added by Ch. 26, Laws of 1951);

Oklahoma (Sec. 1.199(f), Ch. A, Title 18, O. S. 1951, as added by H. B. No. 427, Laws of 1951);

Oregon (Senate Bill 385 of 1953). The Oregon statute limits its application, however, to "any foreign bank, foreign trust company or foreign insurance company, interinsurance or reciprocal exchange."

South Carolina (Sec. 7789, L. 1942, as amended by Act No. 255, Laws of 1951). A fee of $50. is required.

Tennessee (Ch. 47, Laws of 1953). The application of the law, however, is limited to foreign mutual savings banks and mutual savings fund societies, or their wholly-owned foreign subsidiaries.

Texas (Sec. 2, Art. 1529, Ch. 19, R. C. S., as added by H. B. 359, Laws of 1953).

Other states which had previously enacted like legislation are:

Arizona (Sec. 53-805, Code 1939);

South Dakota (Sec. 11.2102, Code 1939);

Wisconsin (Sec. 180.801, subsec. 2, Wis. Statutes).

Louisiana, through Act No. 349, Laws of 1950 has provided a special procedure for qualifying a foreign corporation for the purpose of carrying on limited activities within the state.

Appointment of Process Agent

In six of the thirteen states mentioned, foreign corporations loaning money on mortgage on local real estate, without qualifying, are obliged, under the statutes cited, to appoint a state official—the Secretary of State, in most instances—as agent for the service of process upon the corporation. The Sec-

retary of State is the designated official in New Mexico, South Carolina, South Dakota and Wisconsin. In Arizona, "each member of the Corporation Commission" is to be appointed, while in Oregon, the Corporation Commissioner is the official to be designated, and in Oregon, also, an annual license fee of $200. is required to be paid by the foreign financial institution or insurance enterprise to which the requirements apply.

Court Decisions

An unlicensed foreign corporation holding a mortgage on lands within a state has been permitted to maintain suit upon such a mortgage in the state's courts in many instances. Frequently, the courts rule that the transaction, being a single act, does not amount to the carrying on of business contrary to the pertinent statute,[1] while in other instances the transaction is regarded as an out-of-the-state activity, even though relating to property within the state, in connection with which suit may be maintained.[2]

Where, however, an unlicensed foreign corporation has entered a state for the purpose of conducting the general business of loaning money and taking mortgages on real property as security, or where such a corporation has conducted a local business apart from its mortgage negotiations, the courts have naturally ruled that because intrastate business was carried on contrary to the statutes, suits on the mortgages could not be maintained.[3] States denying unlicensed foreign corporations, doing intrastate business, the right to maintain actions on contracts entered into within the state relating to local business, even though qualification is later effected, are: Alabama, Arizona, Arkansas, Idaho, Iowa, Michigan, Mississippi, Missouri, New Jersey (as to corporations from states in this group), New York, South Dakota, Texas, Utah, Vermont and Wyoming.

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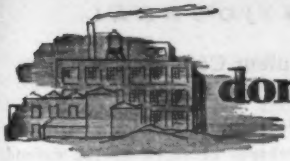
[1] *Western Loan & Bldg. Co. v. Elias Morris & Sons Co. et al.*, (Ariz.) 29 P. 2d 137; *Moran v. Union Sav. Bank & Trust Co.*, (Ark.) 97 S. W. 2d 638; *Ockenfels v. Boyd* (Ark.) 297 Fed. 614; *Equitable Trust Co. of N. Y. v. Western Land & Power Co.*, (Cal.) 176 Pac. 876; *Roseberry v. The Valley Building & Loan Assn.*, (Colo.) 35 Colo. 132; *City Ice Co. of Kansas City v. Quivira Development Co. et al.*, (Kan.) 30 P. 2d 140; *Maxwell v. Hammond et al.*, (Mich.) 208 N. W. 443; *U. S. Loan Co. v. Shain*, (N. D.) 77 N. W. 1006; *Dime Savings & Trust Co. v. Humphreys*, (Okla.) 53 P. 2d 665; *Keene Guaranty Savings Bank v. Lawrence*, (Wash.) 32 Wash. 572. (In Alabama, a single act has been held "doing business." *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275.)

[2] *Worth et al. v. Knickerbocker Trust Co.*, (Ala.) 171 Ala. 621; *National Bank of Wichita v. Spot Cash Coal Co.*, (Ark.) 98 Ark. 597; *Land Development Corp. v. Cannaday*, (Idaho) 258 P. 2d 976; *Continental Assurance Co. v. Ihler et al.*, (Idaho) 26 P. 2d 792; *Hughes v. R. O. Campbell Coal Co. et al.*, (Ky.) 258 S. W. 671; *American Freehold Land-Mortgage Co. v. Pierce* (La.) 21 So. 972; *Manhattan & Suburban Savings & Loan Assn. v. Massarelli et al.*, (N. J.) 42 Atl. 284; *Peoples Building Loan & Savings Assn. v. Berlin*, (Pa.) 201 Pa. 1; *Erwin National Bank v. Riddle*, (Tenn.) 79 S. W. 2d 1032; *Security Co. v. Panhandle National Bank*, (Tex.) 93 Tex. 575.

[3] *Chattanooga National Building & Loan Assn. v. Denson*, (Ala.) 189 U. S. 408, 23 S. Ct. 630; *Sullivan, Receiver, etc. v. Vernon et al.*, (Ala.) 121 Ala. 393; *John Hancock Mutual Life Ins. Co. v. Girard*, (Idaho) 64 P. 2d 254; *The People's Building, Loan & Savings Assn. v. Markley et al.*, (Ind.) 27 Ind. App. 128; *National Mercantile Co. v. Watson, Corp. Com'r., et al.*, (Ore.) 215 Fed. 929; *British-American Mortgage Co. v. Jones*, (S. C.) 58 S. E. 417; *Dunn v. Utah Serum Co.*, (Utah) 238 Pac. 245.



domestic corporations

DELAWARE

In appraisal of stock of manufacturing company, owned by stockholders dissenting to merger, court gives less weight to asset value and readjusts weights given by appraiser to market value, earnings value and dividend value of each share.

"This is a decision on exceptions to the appraiser's report fixing the value of the shares of certain stockholders who dissented from the terms of a merger and sought an appraisal under what is now 8 Del. C. Sec. 262." Defendant, a manufacturing company, by statutory merger, absorbed another company. The holders of 4,400 shares of defendant's stock dissented from the merger and became entitled to an appraisal. After prolonged proceedings, the appraiser determined the value of each share of stock to be $23.20. The dissenting stockholders filed no exceptions to the appraiser's report but the defendant filed numerous exceptions. The Court of Chancery, New Castle County, reduced the value to $20.08.

In arriving at his figure, the appraiser had assigned the following respective weights to the per share amounts: for asset value 30%; market value, 25%; earnings value, 30%, and dividend value, 15%. The Chancellor altered these percentages to the following: asset value per share, 20%; market value, 30%; earnings value, 25%, and dividend value, 25%. The court emphasized that the problem was to be approached from the going concern point of view, not liquidation. Referring to the 30% weight given by the appraiser to asset value per share, reduced by the court to 20%, the Chancellor observed: "Since going concern value is the test, it would seem to me that the placing of an undue emphasis on asset value would be to treat the matter, by indirection, as a liquidation. This, of course, is not permissible under our appraisal statute as construed by our courts." Alluding to the other changes made by it, the court remarked: "These readjustments will give great consideration to earnings, dividends and market values. At the same time it will reflect asset value without unduly distorting the aggregate value figure. It must be kept in mind that the weightings are at best only guides and are not to be rigidly applied regardless of value consequences."

Heller et al. v. Munsingwear, Inc., Court of Chancery, New Castle County, July 23, 1953. Clarence W. Taylor of Hastings, Stockly & Walz of Wilmington, and Ben W. Palmer of Minneapolis, Minnesota, attorneys for Leonard Heller, Minnie Meyers and Henry L. Meyers, Executors of Simon Meyers, deceased. Aaron Finger of Richards, Layton & Finger of Wilmington, attorney for David Kabaker and A. L. Stamm & Co. William Poole of Berl, Potter & Anderson of Wilmington and Paul Christopherson and George D. McClintock, Jr., of Faegre and Benson of Minneapolis, Minnesota, attorneys for defendant. Commerce Clearing House Court Decisions Requisition No. 500303; 98A. 2d 774.

Jurisdiction, in suit under Fraudulent Conveyances Act, obtained over foreign corporation through seizure of stock owned in Delaware company, upheld.

"This is the decision on the motion of one defendant for lack of jurisdiction and on the motion of both defendants to dismiss for failure to state a claim upon which relief can be granted." Plaintiff Maryland company had sued one of the defendants, a Delaware company, in the Delaware United States District Court for fraud and deceit. That court filed certain findings of fact and conclusions of law to the effect that that defendant was liable to plaintiff for such damages as plaintiff might prove. At the time this action was commenced in the Court of Chancery, New Castle County, plaintiff's damages had not yet been ascertained in the District Court. The other defendant, a Washington corporation, which, by reason of stock ownership, dominated and controlled the defendant Delaware company, had caused the Delaware company to rescind a contract with plaintiff, alleged by plaintiff to result in defrauding creditors of the Delaware company, of which plaintiff was one. It sought the reinstatement of the contract and other relief. A question was whether jurisdiction was obtained over the Washington corporation through the seizure by the court of the shares of stock of the defendant Delaware company which were owned by the Washington corporation under the provisions of 10 Del. C. Sec. 366. The court found support in the Fraudulent Conveyances Act for the obtaining of jurisdiction, whether relief were to be granted through monetary relief or through the alternative of reinstatement of the contract, and, therefore, denied the motion to dismiss for want of jurisdiction.

The court also denied the motion to dismiss for failure to state a claim upon which relief could be granted, finding that the complaint set forth allegations of a fraudulent conveyance sufficient to withstand a motion to dismiss.

E. M. Fleischmann Lumber Corporation v. Resources Corporation International et al., 98 A. 2d 506. William H. Foulk and Herbert L. Cobin of Wilmington and Robert F. Skutch, Jr., of Weinberg & Green of Baltimore, Maryland, attorneys for plaintiff. William Marvel of Morford, Bennethum and Marvel of Wilmington, attorneys for defendants. Commerce Clearing House Court Decisions Requisition No. 499885.

NEW JERSEY

Corporate contribution to a university held valid by the Supreme Court of New Jersey.

In *A. P. Smith Manufacturing Company v. Barlow et al.*, 97 A. 2d 186 (The Corporation Journal, August-September, 1953, page 246), the Superior Court, Chancery Division, upheld the directors of plaintiff corporation in making a contribution of $1,500. to Princeton University, effected under 1930 legislation, as amended, permitting corporate contributions by New Jersey companies to community funds and charitable, philanthropic or benevolent instrumentalities conducive to public welfare, under certain limitations, and also, more pertinent, 1950 legislation declaring it to be the public policy of the state that encouragement shall be given to the creation and maintenance of institutions or organizations engaged in "educational, scientific or benevolent

activities or patriotic or civic activities conducive to the betterment of social and economic conditions," and granting New Jersey companies permissive power to make contributions mentioned in this public policy under certain specified restrictions related to stock ownership by the recipient institution.

Upon appeal to the Supreme Court of New Jersey, the state's highest court has affirmed the decision of the Chancery Division of the Superior Court. In doing so, the court observed: "We find that it was a lawful exercise of the corporation's implied and incidental powers under common-law principles and that it came within the express authority of the pertinent state legislation."

A. P. Smith Mfg. Co. v. Barlow et al., 98 A. 2d 581. Josiah Stryker of Newark, argued the cause for defendants-appellants (Stryker, Tams & Horner of Newark, attorneys). Waldron M. Ward, of Newark, argued the cause for plaintiff-respondent (Pitney, Hardin & Ward, Newark, attorneys; Robert P. Weil, of the New York Bar, New York City, of counsel). Theodore D. Parsons, Atty. Gen., argued the cause for the State (Thomas P. Cook, Deputy Atty. Gen., on the brief). Jackson, Nash, Brophy, Barringer & Brooks, of the New York Bar, New York City (Williamson Pell, Jr., of the New York Bar, New York City, of counsel), attorneys for Princeton University, amicus curiae.

NEW YORK

Stockholders dissenting to merger, surrendering stock at appraiser's value while appeal was pending, ruled not to have waived right to appeal.

Petitioners were dissenters to a plan of merger of their company with a subsidiary. Upon the approval of the proposed plan, petitioners and others instituted this appraisal proceeding pursuant to Section 21 of the Stock Corporation Law to fix the value of the common shares held by them. The appraisers, after hearing controverted testimony, reported that the common stock had a value of $7.50 per share. While the case was en route to the Court of Appeals of New York, and during the pendency of the appeal to the Appellate Division, certain of the appellant stockholders turned in their shares and took payment at the $7.50 rate. Such surrender and payment was without reservation or stipulation by either party respecting prosecution of the pending appeal. The Appellate Division, without opinion, upon motion of the corporation, granted a motion for an order dismissing the appeal of each of the petitioners who had turned in their stock and received payment. The Court of Appeals remarked that this was probably done because their interest in the litigation was deemed thereby terminated for all purposes, including the prosecution of the appeal, assuming the Appellate Division applied the general rule that in ordinary cases a party who accepts the benefit of a judgment thereby waives his right to appeal.

The Court of Appeals reversed the ruling of the Appellate Division and ordered the appeal to the Appellate Division reinstated. The court observed: "When fairly read it seems clear beyond peradventure that the scheme of the statute contemplates that a dissenting stockholder shall receive the value of his stock and this, if it means anything, must mean the proper value. Nowhere does the stat-

ute indicate that his right to establish such value, including the right to appeal from a controverted valuation, is cut off by the surrender and acceptance of payment at the controverted appraised value. Under such a reading of the statute, there is no substance to the respondent's contention that surrender of the stock certificates and acceptance of payment at the appraised rate amounts to a waiver of this right to appeal to test the propriety of the quantum." "The circumstance that the petitioners sought on the return of the respondent's motion for confirmation to have a provision included in the order permitting acceptance of payment at the appraised rate *without* prejudice to an appeal—which the court rejected—does not establish a waiver in and of itself—in fact, the appeal negates consent. It was, in truth, a bona fide effort to avoid litigating the very dispute now before us."

In re Silverman et al., 305 N. Y. 13, 110 N. E. 2d 402. Bernard S. Kanton, George C. Baron and Frederick Doppelt of New York City, for appellants. Neil P. Cullom and Stanford Schewel of New York City, for respondent.

Stockholder suit to compel declaration of dividend ruled within Section 61-b, G. C. L., requiring security for corporate expenses.

"The question on this appeal," observed the New York Supreme Court, Appellate Division, First Department, "is whether an action by a stockholder against a corporation and its directors to compel the declaration of a dividend in an action in the 'right' of the corporation, requiring the plaintiff, under Section 61-b of the General Corporation Law, to give security for the expenses which may be incurred by the corporation in the action. As the question is posed to us by the parties it is whether such an action is representative in the personal right of the stockholders or is derivative in the right of the corporation."

The New York Supreme Court, Appellate Division, First Department, affirmed an order of the Special Term granting a motion of defendant-respondent corporation for an order pursuant to Section 61-b, requiring plaintiff to give security for expenses in connection with this action. The court noted that the weight of authority was that such an action is derivative. After a consideration of legislative intent in enacting the section, the court concluded: "It is obvious that the corporation in the instant case will be subjected to substantial expense in the detailed inquiry necessitated by a challenge to the dividend policy adopted by its duly constituted authorities. The responsibility which is required from a stockholder instituting such an action is quite in order here. The plaintiff should either convince a sufficient number of her brother stockholders of the correctness of her position to present the requisite stockholder showing or should be required to post the security required by the law."

Gordon v. Elliman et al., 116 N. Y. S. 2d 671. Aaron Schwartz, of counsel, (Mortimer A. Shapiro with him on the brief; Nemerov & Shapiro, attorneys) of New York City, for appellant. Sidney G. Kingsley, of counsel, (Sylvester & Harris, attorneys) of New York City, for respondent. Commerce Clearing House Court Decisions Requisition No. 484791.

Petitioner, purchasing stock ex-rights which was not delivered to him until after date books were closed for transfer, ruled not entitled to demand proxy from record owner.

Petitioner, as an alleged owner of 1,000 shares of stock of Hudson & Manhattan Railroad Co., sought an order requiring respondents, the record owners thereof, to give a proxy for the voting of those shares at a stockholder's meeting which was to be held on April 8, 1953. The purchase upon which the petitioner relied was made on the New York Stock Exchange on March 13, 1953, and delivery of the certificates was not made until March 19, 1953. Meanwhile, and on March 18, 1953, the books of the corporation had been validly closed for transfer until after the meeting scheduled for April 8, 1953, and under the rules of the Stock Exchange, petitioner's purchase was ex-voting rights.

The New York Supreme Court, Special Term, Part I, ruled that under these circumstances, Section 47 of the Stock Corporation Law did not entitle petitioner to demand a proxy or make it respondent's duty to give him one.

Bunker v. Gruntal, 129 N. Y. L. J. 1137.

foreign corporations

MASSACHUSETTS

Foreign corporation, having resident representative soliciting orders filled from another state, clothed with authority to investigate complaints of customers, ruled subject to service of process.

Defendant Illinois corporation contended it was not doing business in Massachusetts so as to be subject to the jurisdiction for the purpose of service of process upon it. While having no usual place of business in the state, it had, for four years, employed a permanent sales representative who resided in the state, whose duty it was to solicit business and foster good business relations between the trade and the defendant. He had authority to investigate complaints of customers, but not to bind the defendant in the settlement of disputes. Products were sold to about 225 customers in Massachusetts. The company had no property, telephone or listing there. All orders taken were sent to, and filled directly from, Illinois. Through an advertising agency "doing business and located outside of Massachusetts," the defendant advertised in local papers soliciting business. In recent years, to encourage and promote the sale of its products locally, it had held an an-

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nual sales convention in Boston attended by its president and several sales managers.

The Supreme Judicial Court of Massachusetts, in an order affirming the action of the lower court in upholding service of process upon the defendant, noted that it was not necessary, under the law, for a foreign corporation to maintain an office in order to become subject to the jurisdiction, and remarked: "There was a regular and systematic effort to acquire business by solicitation which was successful practically throughout the Commonwealth and which led to the acquisition of a substantial number of customers. Here again there was more than mere solicitation. There was the investigation of complaints by a permanent representative resident in the Commonwealth, who was empowered to do whatever was incidental to selling and fostering good relations with the trade."

Jet Mfg. Co., Inc. v. Sanford Ink Co.,* 112 N. E. 2d 252. Stanley S. Ganz (James A. Doyle, with him), of Boston, for defendant. Russell J. Coffin of Boston, for plaintiff.

* The full text of this opinion is printed in the **State Tax Reporter**, Massachusetts, page 511.

NEW HAMPSHIRE

Service effected upon Secretary of State, as agent of unlicensed foreign corporation doing business in state, upheld.

Defendant unlicensed foreign corporation moved to dismiss service upon it in a libel action, made upon the Secretary of State as agent for service of process under R. L., Ch. 280, as amended by Laws 1949, Ch. 206, Secs. 4 and 8. The defendant was the publisher of a magazine printed in New Hampshire by its co-defendant. The Supreme Court of New Hampshire concluded that the moving defendant was doing business in the state to the extent that service of process could be made upon it there and that the permitted method of service upon the state official, although not exclusive, was valid.

Labonte v. American Mercury Magazine, Inc. et al.,* 96 A. 2d 200. Hughes & Burns, Donald R. Bryant of Dover, and Rich & Burns of Berlin, for plaintiff. Wyman, Starr, Booth, Wadleigh & Langdell of Manchester, and Robert P. Booth of Manchester, for defendant Mercury. Sulloway, Jones, Hollis & Godfrey of Concord, for Rumford Printing Co., filed no brief.

* The full text of this opinion is printed in the **State Tax Reporter**, New Hampshire, page 704.

OHIO

Delaware corporation, which had been dissolved in good faith by merger under Delaware law, ruled entitled to have anti-trust suit against it in Ohio federal court abated.

"The single issue presented by this appeal," said the United States Court of Appeals, Sixth Circuit, "is whether a Delaware corporation indicted by the government for violations of the Sherman Anti-Trust Act, 15 U. S. C. A. Secs. 1-7, 15 note, but dissolved in good faith by merger under applicable Delaware law, is entitled to have the criminal proceedings against it abated. The district judge decided the question in the affirmative and the United States appeals."

The court, after an examination of the Delaware law and pertinent decisions, affirmed the judgment of the District Court. It referred to Section 42 of the Delaware Corporation Law, which continues Delaware corporations which expire by their own limitation or which are otherwise dissolved, for three years as bodies corporate, for the purpose, among other things, of prosecuting and defending suits by or against them, and contains a proviso extending their continuance as bodies corporate beyond the three-year period until any judgment, orders, or decrees in actions, suits or proceedings begun by or against the company within the three-year period are fully executed. The court viewed the section as speaking in the language of civil litigation and not in that of criminal proceedings.

United States v. Line Material Co., 202 F. 2d 929. George W. Wise, of Washington, D. C. (George W. Wise, Trial Attorney, of Washington, D. C., Newell A. Clapp, Acting Asst. Atty. Gen., and Donald P. McHugh, of Washington, D. C., and Robert B. Hummel, of Cleveland, Ohio, on the brief), for appellant. Richard F. Stevens, of Cleveland, Ohio, and Clark J. A. Hazelwood, of Milwaukee, Wis. (C. J. A. Hazelwood, of Milwaukee, Wis., and Howard F. Burns, Richard F. Stevens and John H. Kellogg, Jr., of Cleveland, Ohio, on the brief), for appellee.

UTAH

Solicitation of orders through local television station, forwarded to seller's office in another state, ruled not to constitute station as local office of seller for purposes of service of process.

Defendant foreign corporation paid a local television station for time to advertise its product. At the end of its program, a spokesman for the company invited televiewers to place orders by phoning a number flashed on the screen, that of the television station, where such calls were received, and the information obtained mailed to the company in Maryland, without any additional charge other than the regular advertising fee. Plaintiff responded to the invitation and in due course received defendant's product by mail from Maryland, c. o. d. Alleging injury from the use of the product, plaintiff served process on the television station's manager on the assumption that he, or the station, was either doing the business of or was in charge of defend-

ant's office or place of business in Utah within the meaning of that portion of Rule 4(e)(4), Rules of Civil Procedure, relating to service of process on foreign corporations doing business in the state.

The Supreme Court of Utah concluded that defendant was not doing business in the sense that subjected it, as a foreign corporation, to jurisdiction of the state's courts, observing: "We think the instant case is one, the type of which does not and should not justify the imposition of our powers on a foreign corporation. We are not unmindful of the hardship and difficulty in requiring a local citizen sometimes to seek a foreign tribunal for redress, nor are we unmindful of the burdens to which a foreign corporation could be put were we too lightly to pit our jurisdiction against it. Our fundamental principles demand protection of the individual, but not at the expense of others."

McGriff v. Charles Antell, Inc. et al., 256 P. 2d 703. Pugsley, Hayes & Rampton of Salt Lake City, for appellant. Rich & Strong of Salt Lake City, for respondent.

taxation

ARKANSAS

Sale of tractors to independent contractors, operating under a Government cost-plus-a-fixed-fee contract, ruled subject to state gross receipts tax.

Four corporations, not parties to this suit, entered into an agreement with the United States Government to construct a naval ammunition depot in Arkansas on a "cost-plus-a-fixed-fee" basis. The Arkansas Gross Receipts Tax Act provides that no tax is to be paid on sales to the United States. The appellee, an Arkansas machinery and equipment company, sold, it contended, to the four companies two diesel tractors for a total price of $17,146.66, which were delivered at the site of construction. The State Revenue Commissioner demanded payment from appellant of $342.93 as a 2% gross receipts tax. This appellee paid under protest and instituted a suit for its recovery in the Chancery Court, in which the United States intervened, contending that the sale was made to it. That court upheld this contention and the Commissioner of Revenues appealed to the Arkansas Supreme Court.

The vital question considered by the State Supreme Court was whether the purchaser was the United States or the four companies under contract with the United States. The court, after an examination of the terms of the contract, the pertinent Arkansas law and the Act of Congress known as the "Armed Services Procurement Act of 1947," reversed the judgment in favor of the seller of the diesel tractors, the appellee, concluding that their sale was not, and could not have been, under existing law or the contract, to the United States, but was to the four companies

who were, after proof to the Government's satisfaction that the purchase price had been paid by them, reimbursed by the Government.

*Parker, Commissioner of Revenues v. Kern-Limerick, Inc.,** 254 S. W. 2d 454. O. T. Ward of Little Rock, for appellant. Rose, Meek, House, Barron & Nash of Little Rock and Berryman Green, for appellee. Commerce Clearing House Court Decision Requisition No. 488466. (*Appeal filed in the Supreme Court of the United States, June 11, 1953; Docket No. 115.*)

* The full text of this opinion is printed in the **State Tax Reporter,** Arkansas, page 6357.

DISTRICT OF COLUMBIA

Action of Board of Tax Appeals in allocating to District, for franchise tax purposes, one-half of non-factor sales to District customers, overruled.

In *Lever Brothers Company v. District of Columbia,* decided by the Board of Tax Appeals of the District on September 6, 1951, (The Corporation Journal, December 1951—January 1952, page 53), it was ruled that all sales made through local factors and one-half of sales to District customers, other than sales made through factors, were subject to tax, as being received from District sources.

Upon appeal, the United States Court of Appeals, District of Columbia Circuit, determined that the corporate seller was subject to the tax by reason of having, in the factors, an "agent, or representative having an office or other place of business in the District." Finding that the Board of Tax Appeals, in deciding that one-half of the amount of sales, where title to goods sold passed outside the District, other than sales made through the factors, was attributable to business carried on within the District, had not applied the pertinent regulation of the Commissioners relating to apportionment, but had applied an earlier regulation directing allocation to the District of only 50% of the gross income from each such sale, the court reversed the decision of the Board in part and directed that the regulation prescribed by the Commissioners be applied. This regulation called for allocation to the District of gross income from any sale "principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation" located in the District, regardless of the place of the passage of title.

*Lever Brothers Co. v. District of Columbia,** 204 F. 2d 39.

* The full text of this opinion is printed in the **District of Columbia Tax Reporter,** page 1789.

MISSISSIPPI

Privilege tax on pipe line companies ruled invalid as to a company engaged only in interstate commerce with respect to Mississippi.

Defendant pipe line transportation company resisted the payment of a state privilege tax levied "upon each person operating a pipe line in or through this state or engaged in transporting in or through this state crude oil, liquid petroleum products, and natural or artificial gas through pipes or conduits." The tax was imposed "for the privilege of exercising or enjoying such right and power in this state, and for the privilege of enjoying and receiving the benefits and protection of the government and laws of this state." Defendant operated a pipe line used for the transportation of natural gas from a point in Texas through Louisiana, Arkansas, Mississippi, Tennessee, Kentucky and Illinois, terminating near Tuscola, Illinois. It did not buy, sell, produce or distribute gas in Mississippi, and all of its operations were wholly and exclusively in interstate commerce. The Circuit Court of Hinds County held that the imposition of the privilege tax on purely interstate business was violative of the Commerce Clause of the Federal Constitution and therefore void.

Upon appeal by the State, the Mississippi Supreme Court observed: "The sole question presented is whether the State may validly exact a privilege tax from a person or corporation engaged solely and exclusively in interstate business." Affirming the lower court judgment which held the tax invalid as applied to the defendant, the court reviewed pertinent decisions of the Supreme Court of the United States which it regarded as holding "unqualifiedly that a state privilege tax upon purely interstate operations is a direct violation of the Commerce Clause of the Federal Constitution and cannot stand. Following those decisions we hold that the tax here in question on purely interstate business falls outside the field of legitimate state taxation and that consequently the suggestion of error should be sustained and the opinion rendered herein on November 24, 1952 withdrawn."

*Coleman et al. v. Trunkline Gas Company,** 63 So. 2d 73. Attorneys for plaintiff: J. P. Coleman, Attorney General, Jackson, Mississippi, J. H. Sumrall, Jackson, Mississippi. Attorneys for defendant: Avery & Putnam; R. H. & J. H. Thompson; Lyell & Lyell; Watkins & Eager all of Jackson, Mississippi; Maxwell Bramlette, Woodville, Mississippi; M. M. Roberts, Hattiesburg, Mississippi; Brunimi, Everett, Grantham & Quinn, Vicksburg, Mississippi; Vinson, Elkins & Weems; Stone Wells; E. D. Adams; James B. Henderson; Pat F. Timmons, all of Houston, Texas; W. O. Crain, Shreveport, Louisiana; Wm. A. Dougherty, New New York, New York; M. E. Newcomer, Cleveland, Ohio; Jones & Stratton, Brookhaven, Mississippi. (*Petition for writ of certiorari filed in the Supreme Court of the United States; Docket No.* 179).

* The full text of this opinion is printed in the **State Tax Reporter,** Mississippi, page 8504.

state legislation

California — Chapter 899 enlarges the right of directors to inspect the books and records of their corporations by providing that such inspection may be made in person or by agent or attorney, and directing that the right of inspection includes the right to make extracts.

Connecticut — Public Act No. 143, which will become effective November 1, 1953 contains provision for the exemption from property taxation of merchandise in transit in public commercial storage warehouses.

Delaware — Section 518 has been added to the Corporation Franchise Tax Law to provide that domestic corporations, all of whose assets are located in any country from which it is impossible to remove such assets or withdraw income or whose assets are located in any place where it is made unlawful by any law of the United States of America now or hereafter enacted or by any rule, regulation or proclamation or executive order issued under any such law to send any communications, may, be relieved from making returns and payments under the franchise tax, at the discretion of the State Tax Board.

Florida — H. B. 88 contains provision that the Secretary of State shall prepare and furnish, for a reasonable charge, upon request, a certified copy of a certificate of incorporation or a certified copy of a Composite certificate of incorporation, which Composite certificate shall contain only such provisions as are in effect at the time of certification.

H. B. 513 repealed the provision that a corporation may not have more than thirteen directors, trustees or managers.

H. B. 1125 enacted a new Domestic Corporation Law, effective October 1, 1953.

H. B. 1051 changed the assessment date for all tangible personal property from January 1 to "between January 1 and March 31."

Michigan — Public Act 180 provides that any foreign corporation may acquire or, through another person, firm or corporation legally entitled to engage in business in the state, may make loans, or participations or interests therein, insured or guaranteed in whole or in part by the FHA or VA, which are secured in whole or in part by mortgages of real property located in the state, without qualifying or maintaining authority to carry on, do or transact business in the state and without paying any fees with respect thereto.

Missouri — H. B. 82 provides a "General Not For Profit Act."

Nebraska — L. B. 411, effective September 12, 1953, provides that the shares of a "domesticated foreign corporation" are to be valued and assessed in the same manner as the shares of Nebraska corporations.

North Carolina — House Bill 333 has increased the license fees for a general contractor's original license as follows: unlimited license, from $60. to $80.; intermediate license, from $40. to $60., and limited license, from $20. to $40. Renewal fees have been increased from $30. to $60., from $20. to $40. and from $10. to $20. for the respective licenses.

Oregon — H. B. 142 creates a new Corporation Law, effective December 31, 1953.

appealed to the supreme court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.*

ARKANSAS. Docket No. 115. *Parker, Commissioner of Revenues v. Kern-Limerick, Inc.,* 254 S. W. 2d 454. (The Corporation Journal, October—November, 1953, page 274.) State sales tax—purchases by government contractor—immunity from state taxation. **Appeal filed, June 11, 1953.**

INDIANA. Docket Nos. 261 and 262. *Gross Income Tax Division et al. v. Surface Combustion Corp.,* — N. E. 2d. —. (The Corporation Journal, August-September, 1953, page 254.) Interstate commerce—installation of machinery by seller. **Petition for certiorari filed, August 14, 1953.**

MARYLAND. Docket No. 160. *Miller Brothers Company v. State of Maryland,* 95 A. 2d 286. (The Corporation Journal, June-July, 1953, page 232.) Collection of use tax from nonresident seller through attachment of delivery truck of seller. **Appeal filed, June 30, 1953.**

MISSISSIPPI. Docket No. 179. *Coleman et al. v. Trunkline Gas Company,* 63 So. 2d 73. (The Corporation Journal, October-November, 1953, page 276.) State privilege tax on pipe line transportation—validity—interstate commerce. **Petition for writ of certiorari filed, July 15, 1953.**

* Data compiled from **CCH U. S. Supreme Court Bulletin,** 1953-1954.

regulations and rulings

General — Counsel for corporations planning, near the close of the year, to extend their activities into new states, in which qualification is contemplated, usually give careful consideration to the dates on which qualification is to be effected. It has been found, in many instances, that if qualification and the carrying on of intrastate activities, are deferred until after January 1, there may be savings of taxes which would otherwise be due early in the new year. Also, the preparation and filing of certain tax returns, due early in the new year if qualification and business activities occur prior to January 1, may be postponed for approximately a year, if these steps are delayed until after the new year begins.

Georgia — The Director of the Income Tax Unit is not authorized to reveal information secured by him in administering the income tax laws to municipal tax officials. Local government officials who may receive information are limited to those whose official position entitles them to have access to particular, specified information. (Opinion of the Attorney General to the Director, Income Tax Unit, State Tax Reporter, Georgia, ¶ 14-544.)

Ohio — A foreign corporation is transacting business in Ohio within the meaning of the Ohio foreign corporation act when it purchases and holds for investment purposes real estate located in Ohio and when the transaction is in fulfillment of its corporate purposes and is a part of its ordinary business. (Opinion of the Attorney General, State Tax Reporter, Ohio, ¶ 200-270.)

Texas — Motor bus and motor freight corporations, ordinarily designated as common carriers under a certificate of public convenience and necessity issued by the Railroad Commission, are required to pay a franchise tax and are not entitled to pay it as a public utility. Only the legislature has the power to declare a corporation within the realm of a public utility and unless so designated, the corporation may not avail itself of the lesser tax liability imposed upon public utilities. (Opinion of the Attorney General to the Secretary of State, State Tax Reporter, Texas, ¶ 200-108.)

Washington — A foreign corporation using in its corporate name the word "Engineering" or the word "Engineers" should not be excluded from operating in Oregon, if it files with its application to the Secretary of State for admission a resolution to the effect that it is not the intention, desire or purpose of the corporation to do any professional engineering work or to conduct a general engineering business within the state. (Opinion of the Attorney General to the Secretary of State, State Tax Reporter, Oregon, ¶ 3-002.)

Wisconsin — The Wisconsin Board of Tax Appeals has ruled that a plan of reorganization whereby the assets of the corporation were liquidated and taken over by a co-partnership, and later a new corporation was formed by the co-partners, does not constitute a tax-free reorganization where the purpose of the reorganization was to avoid Federal taxation. The new corporation formed in the process of reorganization must have a valid "business purpose" in addition to the mere saving of Federal tax in order to constitute a tax-free reorganization for Wisconsin income tax purposes. (State Tax Reporter, Wisconsin, ¶ 200-604.)

some important matters

For October and November

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

California — Quarterly Retail Sales Tax Return and Payment due on or before October 31.—Domestic and Foreign Corporations.

Connecticut — Quarterly Retail Sales Tax Return and Payment due on or before October 31.—Domestic and Foreign Corporations.

Delaware — Withholding at source Returns due October 31.—Domestic and Foreign Corporations paying compensation to Delaware employees.

Georgia — Certified Statement for Registration due on or before November 1.—Domestic and Foreign Corporations.

Indiana — Quarterly Gross Income Tax Return and Payment due on or before October 31.—Domestic and Foreign Corporations.

Iowa — Quarterly Retail Sales Tax Return and Payment due on or before October 20.—Domestic and Foreign Corporations.

Maryland — Quarterly Return of Tax withheld at source due on or before October 31.—Domestic and Foreign Corporations.

Missouri — Quarterly Retail Sales Tax Return and Payment due on or before October 15.—Domestic and Foreign Corporations.

New York — Second Installment of Franchise (Income) Tax of Business Corporations due on or before November 15.—Domestic and Foreign Business Corporations other than real estate companies.

North Dakota — Quarterly Retail Sales Tax Return and Payment due on or before October 20.—Domestic and Foreign Corporations.

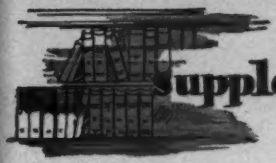
Oregon — Returns of Withholding at the source due on or before October 31.—Domestic and Foreign Corporations.

Rhode Island — Semi-Annual Report to Division of Industrial Inspection during October and April.—Domestic and Foreign Corporations employing five or more persons in Rhode Island.

South Dakota — Quarterly Retail Sales Tax Return and Payment due on or before October 15.—Domestic and Foreign Corporations.

United States — Withholding at source due on or before October 31.—Domestic and Foreign Corporations.

West Virginia — Quarterly Business and Occupation (Gross Sales) Tax Return and Payment due on or before October 30.—Domestic and Foreign Corporations.



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In connection with its various activities The Corporation Trust Company publishes the following supplemental pamphlets, any of which will be sent without charge to readers of The Journal. Address The Corporation Trust Company, 120 Broadway, New York 5, N. Y.

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